

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1389

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1389

UNITED STATES OF AMERICA,
Appellee,
against
ALFRED FAYER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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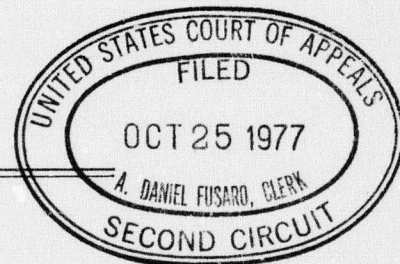


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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-1389

UNITED STATES OF AMERICA,

Appellee,

- against -

ALFRED FAYER,

Appellant.

BRIEF FOR APPELLANT
ALFRED FAYER

PRELIMINARY STATEMENT

Appellant Alfred Fayer, a member of the Bar for 35 years, appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York following a trial before the Honorable Jacob Mishler, C.J. and a jury on June 14-22, 1977.

The judgment of conviction was entered on four counts of an indictment charging the making of false declarations (18 U.S.C. §1623) during Mr. Fayer's testimony at a prior trial before Judge Weinstein at which he was acquitted.

The evidence introduced by the prosecution

at both trials was identical. Both trials were concerned with a single hour and a half conversation in February, 1972 which Judge Weinstein found Mr. Fayer attended for the purpose of rendering advice in good faith to Goodwin in his capacity as an attorney.

On August 19, 1977, Judge Mishler sentenced Mr. Fayer on Count Four to pay a \$5,000 fine, suspended the imposition of sentence on Counts One, Two and Three, and placed him on probation for one month. Execution of sentence was suspended pending appeal. (A 454).*

In pronouncing sentence, Judge Mishler said:

"I know the consequences of a conviction of a felony and the disastrous effect it will have on this defendant. It appears that he was an honorable practitioner through all his years and who can tell what honorable practitioners would have done under these same circumstances?" (A 282).

*References denominated with the prefix "A" are to appellant's Appendix on this appeal. References prefixed "Tr" are to the transcript before Judge Mishler.

ISSUES PRESENTED

1. May the prosecution, consonant with the constitutional prohibition against Double Jeopardy, successively prosecute a defendant after he was once acquitted by submitting essentially the same evidence to another trier of fact under the guise of a prosecution for false declarations at the former trial?

2. Did the Court properly admit hearsay testimony concerning conversations and meetings which occurred out of the defendant's presence, at which the criminal activity of others was discussed?

3. May a witness properly testify to his interpretations and understandings of the non-ambiguous statements of others?

4. May a defendant, consistent with the Fifth and Sixth Amendment, be convicted of making a false declaration where the statement whose explanation was alleged by the indictment to be false was materially altered by the prosecution in summation after the defendant had been confronted with the statement as originally worded?

5. Is a statement material in a false declaration prosecution where the remark itself had no substantial bearing upon the issues tried and the truth of the matter asserted was readily and repeatedly acknowledged by the defendant?

STATEMENT OF FACTS

A. The Proceedings Prior to the First Trial

The trial before Judge Weinstein in February, 1975 was on two indictments, consolidated for trial; one alleging the aiding and abetting of the attempted bribery of a witness (18 U.S.C. §201(d)) (72 Crim. 589) and the other alleging obstruction of justice (18 U.S.C. §1503) (75 Crim. 43).

Both indictments arose from and centered on a conversation on February 9, 1972 between Edward Goodwin, a Federal Housing Administration appraiser, Harry Bernstein, principal owner of Eastern Service Corporation, an approved FHA lender and his wife, Rose Bernstein, and Mr. Fayer.

The theory of the prosecution with respect to the bribery indictment was that Mr. Fayer aided and abetted Harry and Rose Bernstein in offering a job to Edward Goodwin, with the intent of influencing "his testimony under oath in a court proceeding." Its theory with respect to the obstruction of justice charge was that Mr. Fayer corruptly advised Edward Goodwin to claim his constitutional privilege against self-incrimination before the grand jury.

The bribery indictment was returned in May, 1972. Despite the fact that all of the evidence on

which the 1975 indictment was based had been known to the prosecution since the time of the February, 1972 conversation, the obstruction of justice indictment was not filed until two months prior to the first trial.* The obstruction of justice indictment simply provided the prosecution with an additional theory on which to proceed.

B. The First Trial**

The prosecution's proof at the first trial consisted essentially of the testimony of Edward

*The chronology preceding the first trial is illustrative of the extremes to which the prosecution has gone in prosecuting Mr. Fayer. On March 29, 1972 Alfred Fayer was named as a defendant in nine indictments; he was arrested and arraigned the same day. He was charged with a count of conspiracy in each of the nine indictments, and in one of them (72 Crim. 349) was additionally charged with aiding and abetting the bribery of Edward Goodwin, a government employee. (18 U.S.C. §201(b)(2)). On May 22, 1972 all nine conspiracy charges were dropped against Mr. Fayer and he was charged in a superseding indictment with a single count of bribery of Mr. Goodwin, this time under subdivision (d) of 18 U.S.C. §201 (72 Crim. 589). All of the indictments were based and center around the same February 9, 1972 conversation. Mr. Fayer was unable to obtain a trial while the case was assigned to Judge Travia despite repeated attempts.

In all, the prosecution of Mr. Fayer since March, 1972 has involved twelve indictments, of which nine have been dismissed by the prosecution and two of which resulted in acquittals.

**For ease of identification in this brief, the trial of the bribery and obstruction of justice charges before Judge Weinstein is referred to as the first trial; and the trial before Judge Mishler on the false declarations charge is referred to as the second trial. Since the evidence at both trials was essentially the same, these designations seem appropriate.

Goodwin, and tape-recorded conversations of February 8,* February 9 and February 12. Mr. Fayer testified in his own defense (A 499-A 517). At the conclusion of the trial, he was acquitted by Judge Weinstein on both indictments. The facts as developed during the trial were briefly as follows:

Unbeknownst to Mr. Fayer, on January 14, 1972, Edward Goodwin, an appraiser employed by the Federal Housing Authority (FHA), agreed to cooperate with the prosecution and disclose his own complicity in criminal wrongdoing. (A 459). Among the targets a then on-going investigation in which Goodwin was cooperating were Eastern Service Corporation and its principal, Harry Bernstein and his wife Rose Bernstein. Fayer had been and then was an attorney for Eastern Service Corporation, dealing primarily with corporate and real estate matters.

Without disclosing to the Bernsteins that he had agreed to cooperate or that he was equipped with a recording device, Goodwin arranged to meet with the Bernsteins on February 8, 1972 on the pretext of seeking advice. Fayer was not present. A transcript

*The transcripts of the tape-recorded conversations of February 8 and 9 were identical at both trials. They are reprinted in the Appellant's Appendix with the exhibit designations given them at the second trial. Exhibit 3A is the transcript of February 8 (A 283-A 354); Exhibit 4A is the transcript of February 9 (A 355-A 453).

of the conversation, as well as the tape recording itself, was received in evidence over objection.

(A 484).

On the following morning, February 9, 1972 Rose Bernstein spoke with Mr. Fayer. She told him that she had met Goodwin the previous day, who informed her that he was a possible defendant in the FHA investigation. Goodwin said that he consulted an attorney who was also a friend and had discussed the possibility of cooperating. She related to Fayer that Goodwin was uncertain as to what he should do and whether he could rely on the advice he had received. Fayer offered to give Mrs. Bernstein the name of an attorney for Goodwin, but Mrs. Bernstein said that Goodwin did not feel that he needed a lawyer, but simply wanted some advice. (A 501).

Fayer suggested that they come to his office, but was told that Goodwin wanted to avoid that since Mr. Fayer's offices were in the same office building as the FHA. When Rose Bernstein suggested that they meet Goodwin for dinner, Fayer agreed. (A 501-502).

Fayer's purpose for going to the meeting was to give legal advice to Goodwin. (A 503). He did not know that the Bernsteins had paid Goodwin bribes in the latter's capacity as an FHA appraiser, and was unaware of the illicit relationship between them. (A503).

Goodwin did not expect anyone at the meeting except the Bernsteins. He had, however, been equipped with a surreptitious recording device. The tape recording itself and a transcript were received in evidence without objection.

In the ensuing hour and a half conversation, Goodwin never once told Fayer that he did not wish advice concerning his status or whether he should continue to rely upon his attorney. Rather, Goodwin falsely pretended that he had not spoken to the FBI and that he was uncertain as to what he should do with respect to the FBI agents. (A 381-382). He falsely explained that he and his then lawyer had spent only a few minutes discussing the matter. (A 373).

Fayer made clear that he himself could not represent Goodwin. (A 505).

He said he was shocked at the advice Goodwin had received after only a few minutes consultation with his friend-lawyer. (A 509, A 514).

Fayer's advice to Goodwin was to no longer rely upon the attorney he had consulted, not to volunteer any information until he received a grand jury subpoena and then to obtain the services of an experienced criminal lawyer (A 404-A 405, A 406, A 408, A 428-A 429, A 505, A 514).

At the conclusion of the meeting, Goodwin was to contact Fayer after he had paid and discharged his attorney.

With respect to the bribery charge, Fayer testified that he did not know anything about a job offer from the Bernsteins to Goodwin until he heard about it on the evening of February 9. (A 515-A 516).

Goodwin called Fayer on February 12, 1972. Goodwin feigned continued interest in obtaining a lawyer and was furnished the name of Jack Korshin, Esq., a respected member of the Bar.

At the conclusion of all the evidence, Judge Weinstein drew the following factual conclusions, among others:

(i) The Capacity in Which Fayer
Attended the February 9 Meeting

Judge Weinstein first addressed himself to the capacity in which Mr. Fayer attended the meeting of February 9. Although he credited Goodwin's testimony that he was not aware that Fayer would be present, he found that Goodwin led Fayer on and never told him that he was not interested in any legal advice. (A 560). He found Fayer attended the meeting in his belief that he was advising Goodwin as an attorney. He found Fayer was providing Goodwin with temporary legal advice concerning whether Goodwin should get another

lawyer. (A 574).

(ii) The Acquittal on the
Bribery Indictment

With respect to the bribery indictment (72 Cr. 589) which accused Mr. Fayer of aiding and abetting the Bernsteins in making a job offer to Goodwin to influence his testimony, the Court found a reasonable doubt based on the testimony of the defendant himself that "he truly believed the Bernsteins' innocence [sic] and that he did not understand the nature of the transaction as one to pay Goodwin for not testifying." (A 563-A 564). The Court dismissed the indictment on the basis of the above finding as well as finding a reasonable doubt on several other grounds.

(iii) The Obstruction of
Justice Indictment

1. Judge Weinstein found Mr. Fayer not guilty of the obstruction of justice charge by again crediting the defendant's testimony:

"* * *I have decided that under no view of the law and the facts can I determine beyond a reasonable doubt that the defendant is guilty. There is a reasonable doubt necessarily because I must and do credit the defendant's testimony with respect to what the Bernsteins said to him. It is fully consistent with what I heard on the tapes and it's consistent with the way the Bernsteins apparently generally manipulated people.

"As far as Goodwin is concerned, the transcript clearly reveals in a sense he led Mr. Fayer on to believe what the Bernsteins had apparently told him and that is that Goodwin wanted legal views from Fayer with respect to whether he should continue to rely upon this attorney or whether he should get a new attorney.

"I'm also in part basing the decision on the fact that the attorney that he did procure was a respected member of the bar, his present attorney, who I do not believe was subject to manipulation by the Bernsteins or by Mr. Fayer."
(A 579-A 580).

2. He found that Mr. Fayer acted in good faith in his meeting with Goodwin. (A 583-A 584; A 587).

3. He expressly did not find beyond a reasonable doubt that Mr. Fayer endeavored "to influence Goodwin to take the Fifth Amendment before the grand jury" (A 581). Rather, he found that Mr. Fayer was saying "Don't go voluntarily * * * If you're subpoenaed, to get another counsel" and "over and over again, 'Before you decide on the Fifth Amendment, consult other counsel.'" (A 582).

4. "I just don't find beyond a reasonable doubt that this defendant was engaged in a conspiracy with the Bernsteins" (A 587-A 588)

In summary, Judge Weinstein acquitted the

defendant Fayer on both charges because he credited his testimony and found that he acted in good faith in his dealing with Goodwin.

C. The Proceedings Following the Acquittal Including the False Declaration Indictment

The prosecution filed notices of appeal from both judgments of acquittal. It withdrew its appeal on the bribery charge, but prosecuted the appeal from the acquittal of the obstruction of justice charge. On September 24, 1975, this court affirmed the judgment of acquittal, holding in substance that the acquittal was not appealable by the prosecution.

On April 30, 1976, the prosecution filed the false declarations indictment against Mr. Fayer, charging in four counts that Mr. Fayer made material false statements in his testimony at the trial (18 U.S.C. §1623).

Count One alleged as false two answers Mr. Fayer gave in his testimony at the prior trial, explaining statements which appeared in the tape-recorded conversation of February 9. In substance the testimony concerned Mr. Fayer's statements to Goodwin not to voluntarily cooperate with the FBI. The indictment alleged that despite his explanations to the contrary, Mr. Fayer had endeavored to influence

Goodwin not to testify voluntarily before the grand jury. (A 5-A 6).

Count Two quoted three answers that Mr. Fayer gave in response to questions by the court concerning his denial of knowledge that the Bernsteins had paid money to Goodwin. It alleged that the truth was that Mr. Fayer and the other parties to the February, 1972 conversation were discussing accusations that Harry and Rose Bernstein had paid bribes to Goodwin. (A 6-A 7).

Count Three related to the same general topic as Count Two, namely the innocence of the Bernsteins, and quoted portions of Mr. Fayer's testimony where he denied any knowledge of illegality between the Bernsteins and Goodwin. It was alleged that Mr. Fayer in fact knew that Harry Bernstein's references were to Goodwin's illegal dealings with he and his wife. (A 7-A 8).

Count Four concerned in substance a single six-word statement made by Mr. Fayer: "Please stay out of it, please." Mr. Fayer testified that he addressed the remark to Mrs. Bernstein to have her stop interrupting his conversation with Goodwin. The prosecution alleged that the statement was, in truth, made to Goodwin to get him to tell his then lawyer to stop his investigation. (A 9-A 10).

D. The Second Trial

The prosecution's proof at the second trial was essentially the same as that at the first trial. It consisted of Mr. Goodwin's testimony and the tape-recorded conversations. Mr. Fayer testified in his own defense, as he had at the first trial.

To the extent that testimony or occurrences at the second trial are necessary to an understanding of the arguments made, they are recited at the subsequent portions of this brief dealing with those arguments.

POINT I

THE JUDGMENT OF ACQUITTAL AND FINDINGS
OF FACT IN APPELLANT'S FAVOR AT THE
FIRST TRIAL COLLATERALLY ESTOP THE
PROSECUTION FROM PROSECUTING HIM ON
ESSENTIALLY THE SAME EVIDENCE FOR
ALLEGED FALSE DECLARATIONS IN HIS
FORMER TESTIMONY

Apparently dissatisfied with the acquittal and unsuccessful in overturning it on appeal, the prosecution indicted appellant for making false declarations (18 U.S.C. §1623) in his testimony at the first trial. It relied on essentially the same evidence which it introduced at the first trial. Not unexpectedly, the second trial amounted to no more than a re-trial of the first case with the prosecutor attempting to persuade a second trier of fact of the defendant's guilt after having failed with the first. In so doing, it abrogated the defendant's legitimate interest in the finality of a verdict of acquittal, embodied in the Fifth Amendment's Double Jeopardy Clause and the conviction must be reversed.

For more than 60 years, collateral estoppel has been an established rule of federal criminal law. United States v. Oppenheim, 242 U.S. 85 (1916). Since Ashe v. Swenson, 397 U.S. 436 (1970), this rule has been recognized as an integral

part of the Fifth Amendment's guarantee against double jeopardy. Simply stated, the rule provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id., at 443. Under the holding in Ashe, double jeopardy is a constitutional bar not only to retrial for the same offense, but also relitigation of adjudicated issues whether contested in trials for the same or different offenses. Thus, the prosecution is foreclosed from relitigating in a subsequent trial any issue of ultimate fact determined in the defendant's favor in a prior criminal proceeding. Underlying this prohibition is the principle that

"the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187-8 (1957).

All that need be shown is that the verdict in the earlier case necessarily decided the issues raised in the second trial. United States v. Cala, 521 F.2d 605, 608 (2d Cir. 1975); United States v.

Gugliaro, 501 F.2d 68, 70 (2d Cir. 1974); United States v. Tramunti, 500 F.2d 1334, 1346 (2d Cir.), cert. denied, 419 U.S. 1079 (1974); United States v. Zane, 495 F.2d 683, 691 at n.5 (2d Cir.), cert. denied, 419 U.S. 895 (1974); United States v. Friedland, 391 F.2d 378, 382 (2d Cir.), cert. denied, 404 U.S. 867 (1971). This determination must not, however, be made in a "hypertechnical and archaic" manner, but with "realism and rationality." Ashe v. Swenson, *supra*, at 444. The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceeding." Sealfon v. United States, 332 U.S. 575, 579 (1948).

The determination in this case is made easier for two reasons. First, the evidence relied upon by the prosecution was in essence the same in both trials. Second, the prior acquittal was not a general jury verdict, but rather specific findings of fact in the defendant's favor by a judge. Compare Ashe v. Swenson, *supra* at 444.

The similarity of the evidence and issues in the two trials was in itself sufficient to warrant a reversal of the conviction. United States v. Nash, 447 F.2d 1382 (4th Cir. 1971); United States v. Robinson, 418 F.Supp. 121 (D.Md. 1976); United

States v. Drevetzki, 338 F.Supp. 403 (N.D.Ill. 1972).

Although the prosecution is not constitutionally barred in every situation from prosecuting a defendant for perjury following an acquittal, it is foreclosed from doing so when it relies on "substantially the same evidence presented on the first trial." Youngblood v. United States, 266 Fed. 795, 797 (8th Cir. 1920).

The rationale for this rule was succinctly stated in Allen v. United States, 194 Fed. 664, 667 (4th Cir. 1912):

"...it is very hard to imagine any state of things which would justify an indictment for perjury of an acquitted defendant against whom the government offers no other substantial evidence than that which had been before the jury which had found him not guilty. The government and its prosecuting officers should not discredit the verdicts and judgments of its own courts by seeking to induce one jury to find that another gave a wrong verdict upon which is in all material respects the same testimony."

These principles are even more applicable where as here the second prosecution seeks to discredit the judgment of a federal judge.

Nothing demonstrates the substantial overlapping of the two prosecutions more clearly than the formulation of the issues throughout the trial by

the prosecutor. For example, in his opening remarks, the prosecutor stated:

"The evidence will show when you listen to the tape that throughout this lengthy conversation the defendant Fayer endeavored to influence Goodwin not to talk, not to talk to the FBI, the United States Attorney, not to testify voluntarily before the Grand Jury; to do nothing. And if he was subpoenaed, they would get him an attorney.

"Mr. Fayer told Goodwin how several Eastern Service Corporation employees had helped thwart the ongoing investigation by invoking their Fifth Amendment privilege and otherwise not talking.

"He tried to influence Goodwin to follow a similar tactic, not to talk and not to testify before the Grand Jury." (A 27 - A28).

In addition, most of the prosecution's cross-examination of Fayer was devoted to showing that he had endeavored to influence Goodwin to remain silent and that he knew the Bernsteins had paid Goodwin bribes (A 151-A 153; A 154-A 155; A 156-A 158; A 159-A 160; A 161 and A 162).

In his summation, the prosecutor again described the issues for the jury to decide in precisely the same manner as they were at issue at the first trial. He characterized the "essence" of the charge in count 1 as that of Fayer "endeavoring to influence Goodwin not to testify voluntarily before

the grand jury." (A164). He explained the "essence" of count 2 as being that Fayer and the Bernsteins were "discussing accusations and allegations that the Bernsteins had paid bribes to Goodwin" (A165) and that the jury must understand that Fayer and the Bernsteins "were endeavoring to influence Goodwin not to cooperate..." (A172) (also A173; A175; A185). He defined the issues which the jury had to decide in almost the identical words used by the prosecution in the first trial:

"Question: Did Fayer know or believe that the Bernsteins had made bribes to Goodwin?"

"Question: What was Fayer's basic purpose at the February 9th meeting, to protect the Bernsteins or to protect Goodwin?" (A176).

He then proceeded to answer these questions for the jury, by discrediting Fayer's denial of knowledge or belief concerning the Bernsteins' guilt (A176-A178). The prosecutor even attempted to reargue the bribery count, on which Fayer had earlier been acquitted, by making the following statement to the jury (A182):

"Do you really think that [sic] Mr. Fayer an attorney for over twenty-five years, an attorney and close friend of the Bernsteins who barely knew Mr. Goodwin, do you really think he could have so actively and one-sidedly engaged in the efforts to influ-

ence Goodwin not to talk, and yet also be genuinely concerned with Goodwin? Do you really think he would be present here and acquiesce in the offer to Goodwin of a job in Florida, so clearly conditioned on Goodwin's not implicating the Bernsteins, and not realize it was hush money? Do you really think that? It boggles the mind."

The trial court itself was on occasion confused by the similarity of the issues in the two prosecutions. Thus, in its charge with respect to count 1 the court instructed the jury:

"The Government must prove beyond a reasonable doubt that the one or more statements relating to the charge in count 1, that the defendant corruptly endeavored to influence Goodwin not to testify before the grand jury, was made by the defendant, knowing at the time it was intended to influence Goodwin not to testify voluntarily before the grand jury." (A 210).

The court made an almost identical statement earlier in the trial in instructing the jury on the admissibility of certain evidence. (A 100).

It is thus no surprise that the second trial was in substance nothing but a retrial of the first trial, in clear contravention of the double jeopardy clause.

In addition, those portions of Fayer's

testimony upon which the prosecution based its false declaration indictment have already been found credible by one trier of fact or necessarily formed the basis for the prior judgment of acquittal.

Thus, Judge Weinstein, crediting the defendant's denial of knowledge concerning the Bernsteins' guilt, specifically found that (1) Fayer was ignorant of the bribe relationship between the Bernsteins and Goodwin and truly believed in their innocence (A562-A563; A579); (2) he did not, therefore, knowingly participate in the offer of free legal services (A562-A564; A585-589); (3) he in good faith believed Goodwin wanted his advice as an attorney (A 579) and that the advice he gave at the February 9th meeting was designed to protect Goodwin (A 583-584); and (4) he did not corruptly endeavor to influence Goodwin to remain silent before the Grand Jury and take the Fifth Amendment (A581-A582).

Count 1 of the false declaration indictment alleges that the falsity in the excerpted testimony lies in the fact that, despite his denials, Fayer did "endeavor to influence the witness Goodwin not to testify voluntarily before the grand jury." The indictment acknowledges in paragraph 2

that this was an issue at the prior trial. Judge Weinstein specifically found against the Government and in favor of the defendant on this point (A 581-582). See, also, United States v. Fayer, 523 F.2d 661, 663 (2d Cir. 1975). As is obvious from a careful reading of Judge Weinstein's finding, it is based entirely on the credibility of the defendant's own testimony. The government may not now seek to attack that finding of credibility under the guise of a charge of false declarations.

The Government's contention in Count II is that Fayer's denial of knowledge concerning the bribery relationship between the Bernsteins and Goodwin was false. As with Count I, the issue of Fayer's knowledge was fully litigated in the prior trial and specifically determined in his favor. Judge Weinstein explicitly based his not guilty verdict on the bribery count on his finding that:

"...The Court must find a reasonable doubt based upon the testimony of the defendant himself that he truly believed the Bernsteins' innocence..." (A562-563)

Furthermore, on the obstruction charge, Judge Weinstein also based his finding of reasonable doubt on his belief in Fayer's ignorance of the bribe relationship (A 579).

In its closing argument to the Court in the first trial, the prosecution framed the issue for the Court to determine in the form of an "either-or" proposition; either Fayer knew about the bribes and was there that night to protect the Bernsteins, or he was ignorant of their guilt and was there to help Goodwin. (JA 326-327).^{*} Similarly, at the close of the second trial, the prosecutor informed the jury that two specific issues which they must decide were (a) whether Fayer knew of the bribery relationship between the Bernsteins and Goodwin, and (b) whether Fayer's motive the night of February 9 was to protect the Bernsteins or Goodwin (A 176).

There were thus two conflicting explanations for Fayer's attending the February 9th meeting: either he knew about the bribery relationship between his clients and Goodwin and was there to insure Goodwin's silence in order to protect the Bernsteins; or he was genuinely ignorant, as he claimed, of their guilt and was there simply to assist Goodwin by giving him legal advice. Judge Weinstein, explicitly crediting Fayer's denials on that point, resolved the conflict in Fayer's favor, thus precluding the Government from relitigating the issue of Fayer's knowledge. Thus, the case is

^{*}References with the prefix "JA" refer to the Joint Appendix of the government's appeal from the first trial which has also been made part of the record on this appeal.

on all fours with United States v. Nash, 447 F.2d 1382 (4th Cir. 1971), where the court reversed a perjury conviction of a woman previously acquitted of a mail theft charge. When caught with the stolen money, the defendant had offered one explanation for her possession, while the Government offered another conflicting explanation. Although she was acquitted of the theft charge, the Government then indicted her for perjury on the basis of the explanation she had given at the earlier trial for her possession of the money. As the court observed in reversing her perjury conviction (at 1385):

"There were but two conflicting explanations of her possession to be considered. Thus, the jury 'necessarily' had to pass upon the truthfulness of her account. The issue was 'crucial' and once adjudicated, its re-determination in a trial for another offense is estopped."

The same considerations apply with respect to Count 3, wherein the Government charges that Fayer lied when he testified that Harry Bernstein's statement "If you say anything, it blows everything" referred to Goodwin's and not the Bernsteins' vulnerability. As Fayer repeatedly explained, the Bernsteins constantly denied to him ever having given Goodwin any bribes, and thus, the Bernsteins

were not vulnerable (in Fayer's mind) if Goodwin were to talk. As pointed out above, this identical issue of Fayer's knowledge concerning the Bernstein's vulnerability has already been finally determined in Fayer's favor and may not now be relitigated. The entire thrust of the Government's proof at the first trial was directed at establishing that Fayer knew about the bribery relationship and believed the Bernsteins to be guilty. It failed to convince Judge Weinstein of this and it may not now try to convince another trier of fact. United States v. Robinson, 418 F.Supp. 121, 126 (D.Md. 1976).

Finally, as to Count 4 -- which alleges that Fayer's remark "Please stay out of it, please" was addressed to Goodwin and not, as Fayer claimed, to Rose Bernstein -- the Government is equally precluded from prosecuting the appellant.

In Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944), in which the court held that where the fact testified to and as to which the perjury is charged was the same act as constituted the basis of the earlier crime charged, acquittal of the first offense bars a prosecution for perjury. Thus, an acquittal on charges of violating Emergency Price Control Act regulations by receiving payment

for commodities in excess of the fixed ceiling price was deemed to bar a later prosecution of the defendant. The jury where the proof adduced by the Government at the second trial consisted entirely of evidence that the defendant had, contrary to his testimony in the earlier trial, received money in excess of that reflected by the sales slips.

The question as to whom this particular statement was made was much bruited about at the first trial. The prosecution relied upon its contention that the statement was made to Mr. Goodwin in attempting to demonstrate Mr. Fayer's guilt. See A 572-A 573. Judge Weinstein rejected that argument as well as the other arguments of the prosecution in acquitting Mr. Fayer.

In denying the motion for a judgment of acquittal on counts one, two and three on the grounds of collateral estoppel, Judge Mishler said:

"I am in agreement with you to the extent that in a sense it does seem that the Government had two bites of the apple, but my reading of the cases on the collateral estoppel and double jeopardy refer to the specific elements found, the ultimate facts found by the prior jury and they are not the same as in the second trial." (A 282).

In deciding as he did, Judge Mishler incorrectly concluded that Judge Weinstein's findings

at the first trial did not bar the re-prosecution of Mr. Fayer.

Judge Mishler had in accordance with Rule 29, Fed.R.Crim.P. reserved all motions "to and including the date of sentence." (Tr. 5-14). The motion was made and decided prior to the entry of judgment. Judge Mishler had no difficulty reaching the merits of the motion and the prosecution did not contend that the motion was not timely made. Moreover, Judge Mishler had in his possession throughout the trial a copy of the transcript of the earlier proceedings before Judge Weinstein - including his specific findings in the defendant's favor.

The exclusion of Count Four from counsel's motion should not prevent this Court from reaching the merits of the issue with respect to that count. The collateral estoppel prohibition embodied in the double jeopardy clause "rises to the dignity of a constitutional right" and a waiver in these circumstances "requires an intentional relinquishment of a known right by the client rather than by the lawyer." United States v. Moss, (Dkt.No. 77-1134, slip opin. p. 5751, 5763) (2d Cir., Sept. 6, 1977). Moreover, it is within this Court's inherent power to notice errors without objection "if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." United States v. O'Connor, 237 F.2d 466, 472 (2d Cir. 1956), quoting

United States v. Atkinson, 297 U.S. 157, 160 (1936).
 See also, Screws v. United States, 325 U.S. 91, 107
 (1945); United States v. Winston, (Dkt.Nos. 76-1436,
 76-1527, slip opin. 4445) (2d Cir., June 23, 1977);
United States v. Byrd, 352 F.2d 570, 574 (2d Cir. 1965).
 We strongly urge that this is the appropriate course
 to follow in this case.

In summary, the prosecution was foreclosed
 from forcing appellant to "run the gantlet a second
 time" by prosecuting him for false declarations arising
 out of testimony which one trier of fact had already
 found credible or upon which the judgment of acquittal
 was based. Having lost before Judge Weinstein, it may
 not try again without doing violence to the constitution-
 al protection against double jeopardy.

POINT II

THE TRIAL COURT'S ERRONEOUS EVIDENTIARY RULINGS REQUIRE THAT THE CONVICTION BE REVERSED

During the testimony of Edward Goodwin, the
 trial court permitted the prosecution to elicit over
 objection a large amount of testimony relating to the
 criminal activity of others and not bearing directly
 on the sole issue in dispute, whether Mr. Fayer
 testified truthfully at his prior trial. The
 testimony so admitted may be grouped roughly in two
 categories. The first is comprised of conversations
 and meetings between Goodwin and the Bernsteins at
 which Mr. Fayer was neither present nor even mentioned.

The conversations occurred in March, 1967 (over ten years prior to the trial); December, 1971; January and February, 1972. In substance, they concerned the bribery arrangements between Goodwin and the Bernsteins and the Bernsteins' advice to Goodwin when the investigation commenced. Goodwin's testimony about these events occupied 55 pages of the trial transcript, an hour long tape recorded conversation, and a 72-page transcript of the latter. There was no evidence to indicate that Mr. Fayer was aware of the bribery arrangements; indeed, at the prior trial, Judge Weinstein expressly found that he was not. (A 562-A 563; A 579).

The second category involved Goodwin's testimony about his "understanding" of what was meant by statements of Mr. Fayer, and in one instance, by Harry Bernstein, during the February 9 conversation. Goodwin's testimony went far beyond relating merely his "understanding" of the words of others, impermissible in itself; but rather constituted his embellished interpretation of the theory of the prosecution.

A. The Hearsay Declarations of the
Bernsteins and Goodwin Out
of Mr. Fayer's Presence

Goodwin was permitted to testify that in March, 1967 he met Harry and Rose Bernstein at the offices at Eastern Service Corp. In the course of the meeting, Harry Bernstein told Goodwin that in return for "top dollar" on the appraisals of properties in

which the Bernsteins had an interest and for keeping the required repairs to a minimum, they would pay him \$50 for each property. When Goodwin responded that this was not necessary Rose Bernstein rejoined: "Don't be foolish. Take the money. Sock it away. It's better off in your pocket." Goodwin further testified that in the ensuing years 1967 to 1971, he had received a total of \$15,000 from the Bernsteins, customarily being paid weekly on Fridays after the close of business. In return he gave the Bernsteins higher appraisal values than they should have received, and eliminated or minimized the repairs required. (A44-A53).

When the testimony was first sought to be introduced, the prosecution stated that it was offered "solely to show motive and intent of Bernstein under those conversations." It disclaimed any intent to have the defendant bound by it. From this the Court concluded that the hearsay was intended to show "a history of bribery which related to the February, 1972 conversation." (A 46-A 47). The court's conclusion was directly contrary to the prosecution's proffer. No attempt was made by the prosecution to tie this testimony to Fayer. Nor could it properly do so since the issue of Mr. Fayer's knowledge of the Bernsteins' illicit activities with Goodwin had been decided adversely to it by Judge Weinstein at the first trial.

Prior to the testimony being received, the Court gave a limiting instruction which made matters worse. It told the jury that the testimony might explain the taped conversations in February, 1972 (five years later) between the witness (Goodwin) and Mr. Fayer, (A 49) although the prosecution itself ascribed no such probative value to the conversations. It also said that the testimony concerning the conversation in March, 1967 might fairly relate to the issues in this case and the discussions had in February of 1972 "if the defendant knew of the relationship between this witness and the Bernsteins." (A 49). This last statement was in direct contradiction to the findings of Judge Weinstein at the first trial.

On the basis of this ruling, Goodwin described his March, 1967 conversation with the Bernsteins and his further activities with the Bernsteins. He testified that in the middle of December, 1971, he met with the Bernsteins in a car on a street in Hempstead at the request of Harry Bernstein. There, Harry Bernstein told him that he and his wife had been before the grand jury which was investigating corruption at the Federal Housing Administration and "that they took the Fifth Amendment." The Bernsteins told Goodwin that if he were called before the Grand Jury he, too, should take the Fifth Amendment, that if

everybody kept their mouth shut, no one would have a problem and there would not be any further investigation. Goodwin testified that the Bernsteins gave him \$500 as a "Christmas present" since they would be away for the holidays and again told him "just to sit tight and to keep my mouth shut." (A 53-A 55).

After testifying that he had cooperated, pleaded guilty and been sentenced, Goodwin began to recount to the jury a conversation with the Bernsteins on February 1, 1972. At this point defense counsel again objected saying "I think this has gone far enough in the way of background. And it gets worse and worse as it goes along." (A 62-A 63).

Overruling the objection, the Court permitted the testimony. It again repeated its instruction to the jury that the testimony was being received "only to show the history of the relationship between this witness and the Bernsteins", although Mr. Fayer was not referred to or mentioned in this conversation. There was no articulation by the Court as to how this related to the only issue at the second trial, namely whether Mr. Fayer testified truthfully at the prior trial. (A 63).

Goodwin testified that he arranged for the February 1 meeting from the FBI office in Babylon and met the Bernsteins in an automobile on a Hempstead

street. There, he told Harry and Rose Bernstein that he had been visited by two members of the FBI who told him that they were aware of the corruption of the FHA and that he had received monies and bribes from the Bernsteins. The Bernsteins became "very agitated" and told Goodwin "'Just keep your mouth shut. Don't say anything to anybody. * * *'" The Bernsteins also told Goodwin: "And if anyone asks you any questions, take the Fifth Amendment. If you get called before the Grand Jury, take the Fifth Amendment, and don't have anything further to say to the FBI or the U.S. Attorney's Office; they are just fishing and they can't prove anything." The Bernsteins said that the authorities had no way of knowing about any payments since anything Goodwin received from the Bernsteins was in cash. Goodwin had been equipped with a recording device for this meeting, but it apparently malfunctioned since the prosecution did not offer either the recording or a transcript in evidence. (A 61-A 64).

The prosecution was also permitted to introduce Goodwin's testimony of a further meeting with the Bernsteins out of Fayer's presence on February 8, 1972, as well as a tape-recording and transcript of that conversation. The playing of the tape was estimated by the prosecution to take approximately an hour and the transcript is 72 pages long. (A 283-A 354).

During the conversation, the Bernsteins did the vast majority of the talking. They urged Goodwin to get rid of the lawyer he had recently consulted (A 288-89) and to claim his Fifth Amendment privilege if called before the Grand Jury (A 289). They also informed him that other employees of Eastern Service Corp. who had been subpoenaed had invoked their privilege (A 302); that they had advised their own lawyer, Judge Rifkind, that they had never paid any money to any FHA employees (A 307-A 308), and suggested a story which Goodwin could tell his lawyer as the reason for discharging him (A 319-A 320) and that if Goodwin were subpoenaed, they would provide him with a lawyer (A 322).

With respect to this conversation, the court initially reasoned that the jury could infer that as a result of the lawyer-client relationship between the Bernsteins and Fayer, they would have and did tell him everything, including the contents of their conversations with Goodwin. (A 66-A 67, A 69). There was no evidence other than the existence of the attorney-client relationship to support this thesis -- a thesis which is contrary to the experience of lawyers and courts. At the first trial, Judge Weinstein expressly found that the Bernsteins had not informed Fayer of their illicit activity, noting that the Bernsteins "apparently generally manipulated people"

(A 579).

Moreover, this thesis of admissibility is inconsistent with the contents of the conversation. In the conversation, Harry Bernstein says: "Ed [Goodwin], not even your attorney should know these things." (A 342).

Another ground on which the Court may have admitted the testimony was that the Bernsteins' motive in talking to Mr. Goodwin is an issue "in the case", concluding that on this basis the conversation as to what Bernstein said "is not hearsay on that issue." (A 71). The Court did not elaborate on this ruling nor explain why the "Bernstein's motive" was an issue in the false declaration trial. The Court's explanation of its "non-hearsay" determination is equally confusing (A 72):

"THE COURT: Hearsay is not hearsay merely because a party to a conversation--I mean, because the defendant was not a party to the conversation. That's usually the rule. But where an issue does not involve the defendant, conversations concerning that issue made by the persons whose conversation bear directly on that issue is admissible as directly on that issue."

Defense counsel correctly pointed out that the Bernsteins' understanding of what went on does not establish what Mr. Fayer understood. (ibid.)

Goodwin was also permitted to testify about

two conversations he had in the evening of February 8 by telephone. In the first he told Rose Bernstein that he had been unable to get in touch with his lawyer, referring to the latter by an agreed-upon code word "engineer", but that he would keep on trying. In the second conversation she told him that he should discontinue his efforts to reach his lawyer ("engineer") but that he and the Bernsteins should meet the following day. (A 83-A 85). Prior to the receipt of both conversations, the trial court referred the jury to his earlier "limiting" instructions. He promised to charge them more fully on the tape in his main charge. (A 83). The Court certainly never gave the jury an understandable limiting instruction. The only reference in the charge to the use which the jury could make of the conversation appears at A 207-A 208, and it can hardly be characterized as a limiting instruction.

Goodwin's testimony about his relations and conversations with the Bernsteins out of Mr. Fayer's presence occupied roughly 55 pages of the transcript, and a 72 page transcript, as well as an hour long tape recording of the February 8 conversation.

The impact of this testimony on the jury was clearly prejudicial. Count One of the indictment charged that the defendant Fayer made a materially

false declaration when he testified at the first trial that he did not endeavor to influence Goodwin not to testify voluntarily before the grand jury. Mr. Fayer's explanation at both trials was identical: that his purpose was to urge Goodwin not to voluntarily disclose information to the FBI and to obtain a lawyer experienced in criminal matters. Yet, his defense was undercut substantially by the statements of the Bernsteins made out of his presence and without his knowledge. Thus, the Bernsteins' conversation with Goodwin on February 8 was replete with the advice that Goodwin should not testify before the Grand Jury. Similarly, in the Bernsteins' conversation with Goodwin on February 1, they told Goodwin (according to the latter): "If you get called before the Grand Jury, take the Fifth Amendment * * *." And again, in the December, 1971 conversation, the Bernsteins told Goodwin that if he were called before the Grand Jury, he should take the Fifth Amendment. The jury could easily have been misled on the basis of this hearsay to conclude that Fayer's explanation of his intent at the February 9, 1972 meeting with Goodwin was the same as that of the Bernsteins, especially since he had been a lawyer for the Bernsteins for a substantial period of time.

Fayer testified at the first trial that he was not aware in February, 1972 that the Bernsteins

had paid bribes to Goodwin; and in fact had testified that the Bernsteins had denied it not only to him, but also to Judge Rifkind who was then representing them. Fayer's defense was contradicted by the out-of-court declarations of the Bernsteins to Goodwin in 1967 and in December, 1971. There was no proof introduced by the prosecution that Fayer knew that the Bernsteins had paid Goodwin. Yet the jury was permitted to consider in its deliberations testimony indicating that bribes had been paid, as well as the out-of-court declarations which preceded and, in the last instance (December 1971), accompanied the payment.

The prosecution had tried this case once before, unsuccessfully. (See Point I, supra.) It sensed that its chances for success on its second try would be enhanced if it could tie to Fayer knowledge of the bribes, and tie him to what the Bernsteins had clearly told Goodwin - namely not to testify before the Grand Jury. Although Fayer's advice was substantially different, as Judge Weinstein found, the distinction was one a jury would ordinarily not grasp.

It could do so only by relying upon the hearsay declarations of the Bernsteins since it had no proof that Mr. Fayer knew of the arrangement. The prosecutor seized the opportunity which was presented by the inadmissible testimony and put it to effective,

but improper, use in summation.

After describing to the jury that Fayer was the attorney for Eastern Service and the Bernsteins, that he handled mortgage closings for Eastern and had offices in the same office building, the prosecutor described in detail Goodwin's testimony about the agreement to receive bribes in March, 1967, the statements by Rose Bernstein at the time ("sock it away"), the amount received in bribes by Goodwin (\$15,000) and what Goodwin did in return. (A 166-A 167). The prosecutor went on in his summation to describe the December, 1971 meeting between Goodwin and the Bernsteins. He specifically quoted the Bernsteins' advice to Goodwin that "'If you are called before the grand jury, take the Fifth'" (A 168), and he described the Bernsteins' \$500 "gift" to Goodwin, including the Bernsteins' statement "to keep his mouth shut" (ibid.).

The prosecutor continued by describing the February 1, 1972 meeting between the Bernsteins and Goodwin, and specifically the advice the Bernsteins gave Goodwin: "They told him the FBI is fishing, don't talk, take the Fifth Amendment before the grand jury." (Emphasis supplied) (A 169).

The prosecutor also attempted to bind Fayer with the statements made by the Bernsteins on February 8th out of his presence (A 181):

"Moreover, you can notice the straight parallels between the advice that the Bernsteins gave Goodwin on February 8th and the advice that Mr. Goodwin gave on February 9th. February 8th, the Bernsteins regarding Goodwin's attorney: 'Don't tell your attorney anything, don't let him do any investigating, get rid of him.'

"The same thing is repeated on February 9, 1972. February 8, 1972 about Goodwin's cooperating with the Government, 'Don't talk, sit tight, don't do anything until you're subpoenaed. Then we'll get you an attorney. Everybody else is taking the Fifth before the Grand Jury.'

"And what advice is given? What statements were made on February 9th by Mr. Fayer? The exact same statements."*

The out-of-court declarations of the Bernsteins, as related to the jury by Goodwin, were clearly hearsay.** They were received and utilized by the prosecution for the truth of the matter

*The prosecutor attempted to minimize his improper reliance upon such an argument by telling the jury that it was not necessary for it to resolve the question as to how much the Bernsteins had actually told Fayer. (A 181). But the harm had already been done.

**At one point after the jury had heard the testimony the trial court suggested that the conversations of the Bernsteins out of Fayer's presence "might very well be offered as part of a conspiracy to obstruct justice" (A 110). The statement is startling in view of the fact Judge Weinstein acquitted Mr. Fayer of that precise charge. (A 587-A 588). In all events there is insufficient evidence of any such conspiracy

asserted therein, Fed.R.Evid. 801(c), namely that the Bernsteins had paid bribes to Goodwin and that they had advised Goodwin to take the Fifth Amendment during the investigation. F.R.Evid. 802 precludes their admissibility unless there is an applicable exception. The prosecutor did not rely upon any such exception in urging the admissibility of the testimony. Nor did the district court rely on any. The prosecution can no longer assert that the testimony was admitted for a non-hearsay purpose since it relied upon the testimony substantively.

The prosecution's major argument for admissibility seems to have rested on certain references by Mr. Fayer in the February 9 conversation to the earlier conversation between the Bernsteins and Goodwin. The trial court apparently agreed on the basis of two references in the transcript and that the Bernsteins actually told Fayer all about their February 8 conversation. The references appear at A 366 and A 379. There is a third reference at page A 355.

The references to the earlier conversation are marginal at best. The references "Rose has mentioned to me * * * what you said to her yesterday,"

**(cont'd).

whether judged by the reasonable doubt or the preponderance standard. United States v. Petroziello, 548 F.2d 20 (1st Cir. 1977).

(A 355), "when * * * Rose mentioned this this morning" (A 366) and "when I heard this" (A 379) are not sufficient to support the admissibility of the entire conversation, the transcript of which consumes 99 pages. As a matter of simple logic, it does not necessarily follow that because there are references to a prior conversation in a subsequent one, that everything that was said in the former was passed on. That is especially true in this case. The references are totally consistent with Mr. Fayer's testimony at the first trial. Moreover, the thrust of the February 8 conversation itself was that one should not relay information to one's attorney.

The only non-hearsay use to which the February 8th conversation could be put would be to prove notice to Mr. Fayer of the conversation and its contents, but only to the extent that there was proof that the conversation itself or its contents were revealed to him by the Bernsteins.* Since the Bernsteins did not testify and Goodwin was without knowledge on the subject, the only available sources of possible proof were the contents of the February 9 conversation and Mr. Fayer's testimony. He testified at the first trial that the full extent of his

*The relevance of notice to Fayer of the earlier conversation is by no means clear.

knowledge of the earlier conversation was the following: Rose Bernstein told him that she had met Goodwin, an old friend, who had told her he had been interviewed by two FBI agents and had refused to say anything. Goodwin had consulted an attorney who was a friend and who discussed cooperation with the government. Goodwin wished some advice since he was uncertain what he wanted to do and Rose Bernstein asked Fayer whether he would sit down with Goodwin. Fayer initially said he could recommend a lawyer, but Mrs. Bernstein said Goodwin did not feel that he really needed a lawyer, but simply wanted some advice. (A 500-A 502).

Fayer's testimony is totally consistent with the references in the February 9 transcript. While on a question of admissibility, the prosecution is not bound to accept the defendant's testimony, nevertheless it must rely on some proof to establish the required notice to Fayer. It is left only with the references in the February 9 transcript. But under no reasonable construction of those references would the entire hour-long conversation and the 72-page transcript become admissible. The best the proof permitted the prosecution to do was to argue that Fayer had notice of a conversation on February 8th; a fact which was admitted by the defendant and not an issue at either the first or second trial. The references in the February

9th conversation cannot support any greater theory of admissibility.

The net effect was to place before the jury numerous lengthy declarations of the Bernsteins concerning their own conduct and "advice" although they never testified.

B. Goodwin's Testimony of
His Interpretation of
the Statements Made in
the February 9 Conversation

The prosecution also was successful in convincing the trial court to allow Goodwin to testify as to his interpretation of certain statements made by the various participants in the February 9 conversation.

The first instance occurred when Goodwin was permitted to testify that he understood Mr. Fayer's statement "[w]hat do you gain" (A 309) to refer to "cooperating with the United States Attorney or the Grand Jury or the FBI, you can only lose. By talking you can't gain anything." (A 100).

The Court attempted to give a limiting instruction by simply telling the jury when this testimony was received that Goodwin's understanding

was "some evidence" of Mr. Fayer's criminal intent if they believed that Goodwin understood and acted reasonably under the circumstances. (A 101-A 103). The criminal intent purportedly involved was not further identified.

Goodwin also testified as to what he understood Harry Bernstein to mean when the latter said to Goodwin: "If you say anything, it blows everything." His interpretation was that if he "cooperated with the United States Attorney or appear before the Grand Jury or talk to any of the FBI Agents any further, everybody will be in it, including them, including the Bernsteins." [sic] (A 106-A 107). Although the Court overruled an objection to this testimony, neither it nor the prosecution explained how Goodwin's understanding of what Harry Bernstein said bore upon whether Mr. Fayer testified truthfully at the trial at which he was acquitted.

The prosecution also elicited from Goodwin his understanding of Mr. Fayer's statement: "These two, as far as anything is concerned, will not talk." (A 108). Although there seemed to be no doubt as to the meaning of the statement, Goodwin testified that Mr. Fayer was referring to Goodwin's having received bribes from the Bernsteins (A 108) despite the fact that Judge Weinstein had expressly found to the con-

trary. (A 562-A 563, A 579).

The conclusion or interpretation of a witness as to the meaning of what someone else said is not admissible. DeLoach v. United States, 307 F.2d 653 (D.C. Cir. 1962); United States v. Levy, 138 F.2d 429 (7th Cir. 1943), cert. denied, 321 U.S. 770 (1944). Goodwin's testimony was not the testimony of an expert who by training or experience can testify as to the meaning of words foreign to a jury. United States v. Borrone-Iglar, 468 F.2d 419 (2d Cir. 1972) cert. denied sub. nom. Gernie v. United States, 410 U.S. 927 (1973). Nor is this the type of situation where veiled language is utilized to give an outwardly innocent explanation to criminal conduct such as in United States v. Cioffi, 493 F.2d 1111 (2d Cir.), cert. denied, 419 U.S. 917 (1974), relied upon by the prosecution to support the admissibility of Goodwin's testimony.

In Cioffi, the addressee of Cioffi's statements was permitted to testify as to his understanding of veiled terms used by Cioffi "to conceal the real purport of the messages conveyed by Cioffi from Marando to Schbeer, in case anyone else heard the conversation * * * ." (id. at 1116).

Here the situation is totally different. First, Mr. Fayer did not speak in veiled terms to hide his true meaning. He spoke clearly when he told Goodwin

not to voluntarily cooperate with the FBI, and if subpoenaed to get a new lawyer.

But quite aside from this persuasive distinction, the trial court permitted Goodwin to place his own interpretation on what was said, in some instances far beyond a fair reading of the words. There was no justification whatsoever for the trial court to permit Goodwin to testify as to his understanding as to what he understood Harry Bernstein to mean, especially when the response was as prejudicial to Fayer as it was and contrary to Judge Weinstein's finding at the first trial. Nor was there any justification to permit Goodwin to testify as to his understanding of the clear words used by Mr. Fayer, especially when he proceeded to embellish on them to make Fayer a knowledgeable person in the Bernstein's bribery relationship with Goodwin, also contrary to the findings of Judge Weinstein at the first trial.

Nor was the testimony admissible as Goodwin's present sense impressions. F.R.Evid. 803(1). In all events, Goodwin's sense impressions were irrelevant to the crucial issue in the second trial as to whether Mr. Fayer testified truthfully at the earlier trial at which he was acquitted.

There was in this case no reason to depart from the long recognized rule that the conclusion or

interpretations of a witness are not admissible.

The errors in the admission of the evidence described above cannot be deemed harmless. The testimony itself was highly prejudicial to Mr. Fayer. Goodwin's purported "explanatory" testimony as to his understanding made Mr. Fayer responsible for the Bernsteins' assertion of the privilege, although the Bernsteins were then represented by Simon Rifkind, Esq., a noted lawyer and former federal judge. In another instance Goodwin's testimony embellished on the clear words of the tape-recorded conversation to Fayer's prejudice.

The evidence had the effect of stigmatizing the lawyer (Mr. Fayer) for the wrongdoings of his clients, on the basis of the clients' statements and conduct out of his presence although there was no proof that he knew thereof and an expressed finding at the first trial that he did not. The broad brush of illegality proven against two conceded malefactors was utilized by the prosecution to tarnish their lawyer in the eyes of the jury. The evidence so admitted, constituting a substantial portion of the testimony, requires that the conviction which resulted be reversed.

POINT III

THE CONVICTION ON COUNT
FOUR SHOULD BE REVERSED

- A. The Prosecutor's Summation
Constituted a Denial of the
Defendant's Right to Con-
frontation and an Impermissible
Amendment to the Indictment.

Count Four of the indictment concerned Mr. Fayer's testimony at the first trial about a six-word statement made by him during the hour and a half long conversation on February 9, 1972. The six-word statement with which he was confronted at the first trial was "Please stay out of it, please." (A 539).

The statement was taken from the transcript of the conversation stipulated to be accurate by the prosecution and defense at both the first and second trials. The false declaration indictment, the prosecution's opening at the second trial (A 21-A 22) and its cross-examination of Mr. Fayer (Tr.2.99-100) were all premised on the form of the statement as quoted above.

Nevertheless, in summation, the prosecutor argued to the jury that the statement upon which the perjury depended was actually "Please stay out of it completely." (A182a) (Emphasis

supplied.) He did this without prior warning or permission, and in total disregard of his own stipulation, the trial proofs and indeed, the very language of the indictment. The Court overruled defense counsel's objection at the time (A 182a-A 182b), during the jury's deliberations (A 276-A 278) and again in post-trial motions (A 280 - A 281).

The importance to the prosecution of the alteration effected in summation cannot be minimized. Count Four was by far the weakest count of the indictment. Its weakness must have been apparent to the prosecutor since the evidence in both the first and second trials was to be the same. The issue with respect to count four was the intended addressee of the statement. The prosecution contended that this statement was made to Mr. Goodwin; Mr. Fayer testified at both the first and second trial that he made the statement to Mrs. Bernstein to have her stop interrupting his conversation with Goodwin.

It is indeed reasonable that the remark had been addressed to Mrs. Bernstein when it read as everyone agreed it did at the first trial. When the statement was changed by substituting the word "completely", the prosecution's theory

was rendered much stronger; as changed, it makes more sense that the statement was addressed to Mr. Goodwin and intended to be conveyed by the latter to his lawyer.

The issue raised by the prosecutor's conduct is not simply whether he transgressed proper bounds by unilaterally altering his own stipulation in summation as to what the charge and evidence were; although that is clearly involved. Nor is it, as the trial court believed, simply a question of what the primary evidence (the tape recordings) disclosed, rather than what the secondary evidence (the transcripts) indicated. (A182a-A182b).

The issue is far more significant. It is that the defendant may have been convicted on proof against which he did not have an opportunity to defend. Phrased in constitutional terms the questions presented are: May a defendant -- consistent with the due process and confrontation clauses of the Fifth and Sixth Amendments to the Constitution -- be convicted of making a material false declaration where the testimony alleged to be false was given as an explanation of a statement materially altered by the prosecution

after the explanation was made? May a defendant consistent with the indictment clause of the Fifth Amendment to the Constitution be convicted on an indictment whose terms are altered by the prosecution in summation? We submit that in the context of this case the answer to both questions is no.

Mr. Fayer was confronted at the first trial with a statement attributed to him which both his counsel and the prosecutor stipulated was: "Please stay out of it, please." His testimony at the first trial was given on that basis and it is his explanation of the statement in that form which was alleged to be false at the second trial. His testimony at the second trial was again given on the basis of that same understanding, which was by now embodied in the indictment.

Had Mr. Fayer been alerted to the fact that the prosecution's position would be that the statement read, "Please stay out of it completely", there were several ways he could have defended himself. First, had he been confronted with the altered statement at the first trial, his recollection as to whom he made the statement might have been different, thus obviating in its

entirety the charge of false declaration. It must not be forgotten that the first trial was not held until three years after the conversation.* Second, Mr. Fayer could have explained at the second trial that his prior testimony was based on his understanding that the statement was "Please stay out of it, please"; an understanding shared by everyone at that time, including the prosecution. Fairness would mandate that at least one of these two alternatives be furnished a defendant. Mr. Fayer was denied them both by the prosecution's conduct.

There was simply no justification for the prosecutor to act as he did. He did not alert either the court or defense counsel that the questioning at the first trial had proceeded on an erroneous factual premise, as indeed he may have had an obligation to do. Cf. Giglio v. United States, 405 U.S. 150 (1972). He did not alert them that the stipulation was in error or request to be relieved therefrom. Nor did he request that the testimony be reopened to allow further proof.

The due process and confrontation clauses

*The conversation was recorded on February 9, 1972, and Mr. Fayer testified at the first trial on February 20, 1975.

guarantee at a minimum mean that a defendant in a criminal proceeding will be afforded the opportunity to confront the proof against him and to defend the case as framed by the indictment.

Faretta v. California, 422 U.S. 806, 818 (1975); Dutton v. Evans, 400 U.S. 74 (1970); Russell v. United States, 369 U.S. 749 (1962).

These principles are of the utmost importance in connection with perjury and such related crimes as are alleged here. It has always been required that there be total congruity between the question asked and the answer given in order for perjury to be charged. Bronston v. United States, 409 U.S. 362 (1973). The essence of the crime of perjury is that "the question as the defendant understood it was falsely answered" United States v. Chapin, 515 F.2d 1274, 1280 (D.C. Cir. 1975). See also United States v. Wall, 371 F.2d 398 (6th Cir. 1967).

It is inconsistent with these principles to allow an individual to be convicted for making a false explanation of a statement stipulated to be in a particular form, and then allow the prosecution to attempt to prove his guilt by altering the statement in summation and arguing that the

falsity of the explanation was all the more apparent.

In addition, the actions of the prosecutor amounted to an impermissible amendment of the indictment. Russell v. United States, 369 U.S. 749 (1962); Stirone v. United States, 361 U.S. 212 (1960). The false declaration indictment charged that Mr. Fayer's explanation of the tape recorded "Please stay out of it, please" was false. The indictment recorded the charge as made by the grand jury, and it is on that charge which the petit jury must determine the defendant's innocence or guilt. Neither the court nor the prosecutor may change the charge without "resubmission to the grand jury, unless the change is merely a matter of form." Russell v. United States, supra at 770.

Judged by quantitative standards, the change effected by the prosecutor in summation may appear small but qualitatively, and in legal contemplation, it was not. It was every bit as significant as the quantitatively small change in the indictment which the Supreme Court found impermissible in Stirone v. United States, 361 U.S. 212 (1960). There, the indictment charged

the defendant with a violation of the Hobbs Act, 18 U.S.C. §1951, by alleged interference with the interstate transportation of sand. At the trial, the government proved in addition that the activities of the defendant interfered with the movement of concrete used in a mill which would later engage in interstate shipment of steel. The Supreme Court reversed the conviction, holding that the additional proof with respect to transportation of the concrete constituted an impermissible alteration of the indictment, holding (*id.* at 218-219):

"The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

* * *

"The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Here, as in the Bain case, we cannot know whether the grand jury would have included in its indict-

ment a charge that commerce in steel from a non-existent mill had been interfered with. Yet because of the court's admission of evidence under its charge this might have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error."

See also Watson v. Jago, 558 F.2d 330 (6th Cir. 1977).

What the prosecutor did in summation was especially egregious since summation is the culmination of the prosecutor's efforts in the case, and is likely to have significant persuasive force upon the jury.* It is a matter of particular concern to the courts since there exists the possibility that the jury will give special weight to his arguments, because of the rightful prestige of his office and the special fact-finding facilities which the general public attributes to its law enforcement agencies.

A prosecutor's obligation is not primarily to obtain convictions, but rather to see that justice is done.

*Indeed, the jury returned its verdict of guilty on count four, as well as the other counts, within 15 minutes of hearing the portion of the tape recording relating to this statement. (A276-A278).

"He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Berger v. United States, 295 U.S. 78, 88 (1935).

The weaker the case, the more serious the possible injustice to a defendant from the prosecutor's improper conduct in summation. ABA Standards, The Prosecution Function §5.8 at 127 (1971). In this case, the proof was indeed weak on Count Four, and the prosecutor's conduct may well have tipped the scales against appellant.

B. In all events, the alleged false statement was immaterial as a matter of law.

In his testimony at the first trial, Mr. Fayer acknowledged repeatedly that he urged Goodwin to have his recently-acquired lawyer stay out of the matter. (A538-A540). This was consistent with Mr. Fayer's numerous statements in the transcript of February 9 that Goodwin should have nothing further to do with his then attorney, (A404-A405; A406; A408; A428-A429; A430; A445; A449. See also A377; A380; A391-A392;

A 402) a position which the court credited at the first trial.

Mr. Fayer thus acknowledged in his testimony the truth of the prosecution's ultimate proposition, namely, that he urged Goodwin to have his lawyer not to get involved in the case. When judged in the context of the entire testimony, it made little difference to whom the remark "please stay out of it" was made.

The prosecution has the ultimate burden of establishing beyond a reasonable doubt the materiality of the alleged false statements, United States v. Mancuso, 485 F.2d 275 (2d Cir. 1973) and its failure to discharge this burden requires that the indictment be dismissed, see, e.g., United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971). Unlike other elements of the crime, the issue of materiality is a legal question to be decided by the court. United States v. Doulin, 538 F.2d 466, 470 (2d Cir.) cert. den., 97 S.Ct. 256 (1976). United States v. Mancuso, 485 F.2d 275, 280 (2d Cir. 1973).*

Since it is an essential element of the

*During the second trial, the district court was furnished a copy of the transcript of the first trial (A 36), to permit it to make its determina-

crime, the materiality of the alleged false testimony must be alleged in the indictment, as it was here. In paragraph 2, the indictment alleges that it was material at the first trial to determine whether or not in February, 1972, Mr. Fayer did one or more of the following:

(i) endeavor to influence Edward Goodwin not to testify voluntarily before the grand jury; (ii) act in February, 1972 with a corrupt motive or intent, and (iii) discuss in February, 1972 with Goodwin and the Bernsteins accusations or allegations that Harry and Rose Bernstein had paid bribes to Goodwin (A 4 - A 10). The question as to whom the remark was addressed is not material to any of these topics.

It is significant that each of the three claimed material facts is mirrored in one of the first three counts of the indictment, while none is mirrored in the fourth. It is not surprising that there is this absence of parity. Materiality must be judged at the time

*(cont'd.)

tion on the issue of immateriality. At the close of the prosecutor's case, the court found that the testimony at the first trial alleged to constitute false declarations was material to the issues at that trial, and denied the defendant's motion to dismiss the indictment on the ground. (Tr. 2.14).

when and the context in which the particular testimony is given. United States v. Mancuso, 485 F.2d 275, 280 (2d Cir. 1973). The issue at the first trial was whether Mr. Fayer, a lawyer, attempted to improperly influence a potential witness whom he was advising at the time as an attorney. The prosecution was unable to find a single reported case where an attorney was charged with a crime for advising a witness to temporarily avoid speaking to the FBI and to seek other counsel if subpoenaed. Compare Maness v. Meyers, 419 U.S. 449 (1975). A different answer to the question as to whom the statement was made would not convince a trier of fact, namely, Judge Weinstein, that Mr. Fayer had attempted to improperly influence a grand jury witness. The remark and its addressee had nothing to do with whether Goodwin appeared before the grand jury voluntarily, or whether he told the truth, or whether he claimed the privileges afforded by the Fifth Amendment.

One method of determining materiality is to assume the truth of the prosecutor's contentions and to ascertain whether such an answer, if given, would determine any one of the three areas defined in the indictment. United States

v. Howard, ____ F.2d ____ (7th Cir. August 8, 1977) (Dkt. No. 77-1012). Clearly, it would not. Whether the remark was made to Goodwin or to Mrs. Bernstein would not decide even partially whether Mr. Fayer endeavored to influence Goodwin not to testify voluntarily before the grand jury, or whether he acted with a corrupt motive or intent, or finally whether they were discussing allegations that the Bernsteins had paid bribes to Goodwin.*

Since the prosecution failed to establish materiality beyond a reasonable doubt, Mr. Fayer's conviction on Count Four cannot stand.

*We recognize that factually we are bound by the jury's verdict. Nevertheless, listening to the conversation itself on the tape it seems clear that the remark is addressed to someone other than Goodwin, who was present at the dinner. Goodwin himself repeats the remark, not in a questioning fashion, but rather as a repetition of Fayer's imperative statement addressed to someone else at the dinner. Literally, the remark makes the most sense as addressed to someone present at the dinner exhorting immediate action. The transcript itself has no question mark after Goodwin's statement. (A 405). Goodwin testified at the second trial that the remark was addressed to him, and over objection, explained that Mr. Fayer was telling him to tell his lawyer to stay out of it. (A 104-A 105). (See Point II, supra). We have asked the prosecution to forward to this Court the original tape recording (GX 4).

CONCLUSION

Because the Government was collaterally estopped from prosecuting appellant on the basis of the same evidence as presented at the first trial, the judgment of conviction on all four counts should be reversed and the matter remanded to the District Court to enter a judgment of acquittal with respect to each count. Count Four should be dismissed on the additional ground that the prosecution failed to establish materiality beyond a reasonable doubt.

At a minimum, the erroneous evidentiary rulings by the trial court and the prosecutor's improper summation entitle appellant to a new trial.

Respectfully submitted,

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October, 1977

Due and timely service of *Two* copies
of the within *BRIEF* is hereby
admitted this *25th* day of *OCTOBER* 19*77*

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Attorney for *APPELLEE*

U. S. DIST. C. N. Y.

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